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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

22 CR 673 (LAK)

5 SAMUEL BANKMAN-FRIED,

6 Defendant.

7 -----x
8 New York, N.Y.
9 February 16, 2023
2:30 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN,

District Judge

12 APPEARANCES

13
14 DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

15 NICOLAS ROOS

16 DANIELLE SASSOON

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20 Attorneys for Defendant

21 ALSO PRESENT: JOHN MOSCATO, Pretrial Services

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1 (Case called)

2 THE DEPUTY CLERK: Government, are you ready?

3 MR. ROOS: Yes.

4 Good afternoon, your Honor. Nic Roos, Danielle
5 Sassoon, Sam Raymond, Andrew Rohrbach, and Danielle Kudla, for
6 the United States.

7 THE COURT: Good afternoon.

8 THE DEPUTY CLERK: Defendant, are you ready?

9 MR. COHEN: Yes, we are.

10 Good afternoon, your Honor. Mark Cohen, Cohen &
11 Gresser, for the defendant.

12 MR. EVERDELL: Good afternoon, your Honor. Christian
13 Everdell, Cohen & Gresser, for the defendant.

14 THE COURT: Good afternoon, Mr. Everdell.

15 Mr. Roos, are you going to do the honors this
16 afternoon?

17 MR. ROOS: Yes, your Honor.

18 THE COURT: Do you want to begin?

19 MR. ROOS: Sure.

20 So, your Honor --

21 THE COURT: Use the lectern, if you don't mind.

22 MR. ROOS: Your Honor, before you, you have a few
23 pending bail modification requests. There were several
24 requests, two made by the government and one made by defense
25 counsel, earlier this year, and then, more recently, with the

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1 discovery of the defendant's use of a VPN, the government
2 proposed a broader set of conditions relating to the
3 defendant's use of devices, that is, cell phones, tablets,
4 computers, as well as the internet, and the defense, as an
5 alternative, what I would describe as, more narrowly tailored
6 proposal related to the use of VPN. I would like to address,
7 if your Honor is okay with it, the government's new proposed
8 broader condition, which I think subsumed within it are many of
9 the other outstanding or pending or temporary conditions that
10 are discussed in the parties' letters.

11 Let me just start with a description of why,
12 generally, in a case like this, it would be appropriate to
13 restrict the defendant's use of computers and the internet.

14 The nature of the case involves a business that was
15 highly computer and internet dependent. Many of the aspects of
16 the crime are tied up in the way in which computer code treated
17 a particular entity, Alameda Research, and how it was given
18 special privileges, records in this case were stored
19 electronically, oftentimes in web pages built by the defendant
20 and his coconspirators or in Google folders or Google drives,
21 some of which are not, and may never be, accessible to the
22 government. Communications were ephemeral and encrypted. The
23 defendant, as your Honor knows from our prior briefing,
24 emphasized the use of Signal with auto delete set and Slack
25 with auto delete, and deemphasized the use of email.

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1 The use of cryptocurrency, which, of course, was the
2 entire business model, exacerbates the risks associated with
3 the use and access to computer infrastructure. In particular,
4 because crypto wallets are anonymous and can be accessed
5 without the use of a traditional banking system, an individual
6 like the defendant could log in with the right keys, access
7 wallets anywhere in the world, using any computer, and move
8 funds, funds that belong to victims in the case. And there are
9 still, let me say, wallets in this case that are believed to be
10 out there, unaccounted for, or inaccessible.

11 Now, in this case, there have been at least two
12 instances where funds have moved that belong to the FTX estate,
13 the debtor, or to victims. There was one instance shortly
14 right around the time when the FTX entities declared bankruptcy
15 in which millions of dollars were taken out of the estate
16 through a hack, and, more recently, as your Honor knows from
17 our prior briefing, in January, there was an instance in which
18 several wallets associated with Alameda began having transfers.

19 Now, the government, as your Honor knows from our
20 briefing, has done work to see whether or not the defendant was
21 responsible for those transfers, and, in part, that work relies
22 heavily on tracing through the use of other associated wallets
23 and IP addresses. I mention this because it really then gets
24 to the issue before the Court now, which is against this
25 backdrop of extensive use of internet infrastructure and

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1 inherent risks in the case in which ways in which access to the
2 internet or to computers could undermine the evidence, could
3 lead to obstruction, could lead to dissipation of assets, we
4 now have before the Court several instances of specific conduct
5 since the initial bail conditions were set that favor a
6 modification of the bail terms.

7 The first, which your Honor is familiar with, is the
8 use of an encrypted Signal communication to contact a witness
9 in the case. And this has been briefed, and your Honor had a
10 preliminary ruling on it, so I won't go into detail on it, but
11 I'll note that's one instance of the use of an encrypted
12 messaging platform to contact a witness, creating a risk of
13 witness tampering, of obstruction.

14 And now, as we were working through that condition,
15 there has been a second situation or set of facts that showed
16 just sort of how great of a risk the defendant's use and access
17 to computers and the internet poses to the case. And that's
18 the use of a VPN.

19 So, let me say there, the use of the VPN exacerbates
20 the risks of everything I described before. It means the
21 defendant could access cryptocurrency wallets, Google drives,
22 websites, without being subjected to surveillance, without
23 having his identity attached to transactions or movements. It
24 means that monitoring technology, whether it be a pen register
25 or some other form of technology, will not necessarily be able

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1 to capture the defendant's communications, his interactions.
2 It's a way in which he could move generally, obscure, any
3 attempts, by either pretrial or the government, to exercise
4 oversight.

5 So, for that reason, the government proposed a broader
6 set of conditions, a more, what we view as, narrowly tailored,
7 but appropriate, set of conditions that would apply universally
8 to his use of devices and the internet. And quite simply, your
9 Honor, a broader set of rules is appropriate here. We can't
10 keep engaging in some sort of Whac-A-Mole approach where he
11 uses one app, and then we switch to another, and we continue on
12 this road of modifying the bail conditions. It's necessary
13 here, given the contours of the case and the specific instances
14 of the last two months, to have sort of a more clear rule about
15 the defendant's use of devices of the internet and appropriate
16 restrictions to curtail the risks of obstruction and spoliation
17 and just general circumvention of monitoring.

18 So, on pages 4 and 5 of the government's submission
19 from a day ago – this is ECF 73 – we've outlined the proposals.
20 The baseline rule here would be the defendant is prohibited
21 from using cell phones, tablets, computers. And let me say, to
22 the extent that there is ambiguity, these things would be
23 described broadly to include things like smart watches, video
24 game consoles, that allow people to log onto the internet, or
25 anything else that would approximate cell phone, tablet, or

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1 computer.

2 THE COURT: Smart TVs?

3 MR. ROOS: Smart TVs.

4 I would say maybe, broadly speaking, electronic
5 devices that allow access to the internet or to radio or
6 cellular networks might be a better way to describe it,
7 narrowed to these three categories. I think your Honor
8 understands, broadly speaking, we're seeking to restrict the
9 ways in which he can use electronic devices to access the
10 internet.

11 THE COURT: Let me start off right away with a
12 question.

13 You later on jump to allowing him to use these devices
14 in certain circumstances, yes?

15 MR. ROOS: Yes.

16 THE COURT: You are putting an awful lot of trust in
17 him, aren't you?

18 MR. ROOS: Well, your Honor, this is something we've
19 thought a lot about – what's the way in which we can allow for
20 really three things – the defendant's communications with his
21 counsel, his ability to review discovery and prepare his
22 defense, and exercise of his First Amendment rights.

23 Beyond those three things, we are focused on ways --

24 THE COURT: Let's maybe deal with the third one last.
25 The implication of your reference to the First Amendment here

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1 implies, doesn't it, that somebody who's detained pretrial in a
2 federal institution has a constitutional right to access to the
3 internet? I don't think so.

4 MR. ROOS: Your Honor, the way I think we should be
5 looking about the First Amendment issue is not that there is
6 necessarily an unlimited right, but that, of course, the
7 restriction needs to be narrowly tailored and needs to be
8 balanced against countervailing interests. So, I absolutely
9 agree with you, in the context of a federal institution, there
10 are various restrictions. And I think the government is
11 proposing here certain restrictions on the total free exercise
12 of some of those rights. We're trying to find the right
13 balance in terms of --

14 THE COURT: Well, I understand there may be a balance
15 to be struck here, but there are defendants, pretrial
16 defendants, from time to time, in the federal system who are
17 detained and asked to prepare their cases without access to the
18 internet, and there are various ways of doing that, right?

19 MR. ROOS: That's correct.

20 THE COURT: So, in order to differentiate between this
21 defendant, on home confinement, and those defendants for First
22 Amendment reasons, you would have to justify the restriction on
23 internet access on the pretrial detainees by something unique
24 to the detention environment, right?

25 MR. ROOS: I agree with that, your Honor. I think,

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1 actually, here, part of the reason why we're comfortable with
2 any access to the internet is not so much the First Amendment
3 consideration, but the implications that it would have on
4 discovery, with the full restrictions.

5 THE COURT: Okay. So let's move to that. That's
6 where I was going.

7 Now, there's reference in the submissions to access to
8 a database, yes?

9 MR. ROOS: That's correct.

10 THE COURT: And the database is where?

11 MR. ROOS: The database is hosted in the cloud. It's
12 a massive, multiterabyte database that existed previously for
13 FTX and now has been stood up in a read-only form by the FTX
14 debtor estate through its counsel and various consultants. And
15 so the government doesn't have in its possession these
16 terabytes of data; rather, the government has internet access
17 to the cloud-hosted database. What we've done, in
18 conversations with the defense and with counsel for FTX, is to
19 get the defense the same type of access the government has.

20 THE COURT: Okay. So I understand that, too.

21 But from a technical point of view, it would be
22 entirely possible, would it not, to replicate that database on
23 a server or some other appropriate device with sufficient
24 memory that would be physically in the defendant's hands, and
25 if he had a device to access that duplicated database, with a

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1 device that had no communication capability, wouldn't that
2 solve the problem of database access?

3 MR. ROOS: So, I think there are two potential issues
4 with that.

5 The first is purely like a logistical practical one,
6 which is the sheer size of this type of drive, which looks like
7 a suitcase, takes a long time to load, and so just in terms of
8 delay of getting discovery.

9 But I think more the issue, actually, is that the FTX
10 debtor, as I understand it, has, as a condition to given
11 access, put in place various things like read-only technology,
12 monitoring of the types of searches and access that's being
13 given. So I haven't had the specific conversation or played
14 out that scenario with them, with the counsel, but I think one
15 potential concern would be actually we'd be giving the
16 defendant more access, with less supervision, than access to
17 the cloud-hosted version.

18 THE COURT: Well, I hear the concern. I'm not sure
19 it's real, and I'm not sure it isn't, but let's go on.

20 MR. ROOS: So, in terms of the discovery, there is
21 that database. Everything else, the government is putting on
22 hard drives or has been transmitting it through one of these
23 FTP sites, although we certainly could put it on hard drives.
24 So I don't think that inherently requires the internet. We
25 could, for instance, put a copy, a second copy, on a second

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1 hard drive for the defendant or for his counsel to pass along
2 to the defendant.

3 THE COURT: And to just revert for a minute to the
4 last subject, if you had a suitcase-sized server, and enough
5 care were devoted to constructing or to loading it, to what's
6 loaded into it, or, alternatively, the security measures for
7 pieces of the data in there to which access is not being given
8 to the defendant, the separate server or drive, whatever you
9 want to call it, is a viable option for giving him individually
10 access to the database that the FTX receiver has made available
11 to the government; yes?

12 MR. ROOS: I think so. Like I said, I haven't had
13 this exact conversation with them, so there may be technical
14 issues that are not coming to mind for me.

15 The other thing I would say is, I think, just so your
16 Honor understands sort of what's in the database, the database
17 has a number of sort of files and tables and ledgers relating
18 to FTX as the entity. It also has all of the data for all of
19 the customers of FTX, including their wallets, so I think that
20 is one of the reasons why the FTX debtor, through its counsel,
21 is so concerned about the risks of turning over something like
22 this.

23 THE COURT: I imagine that it would be possible to
24 create a duplicate with the exception of the customer wallets,
25 no? It's a question of which files you copy.

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1 MR. ROOS: At this point, I would be speculating, but
2 it's certainly something we could run down.

3 THE COURT: Okay. Let's get on.

4 MR. ROOS: I'm happy to walk through more of this, but
5 I think your Honor has actually already hit on a lot of the
6 points here. We're proposing a broad condition with narrow
7 exceptions to accomplish those specific sort of interests, and
8 then layered over on top of that, sort of two forms of
9 monitoring: One is the pen register that would be set up by
10 the government, and the second would be monitoring, computer
11 monitoring, through technology that's available to U.S.
12 pretrial services.

13 THE COURT: What computers would be monitored?

14 MR. ROOS: So, on that, as I understand it -- and John
15 Moscato is here, and we've had a few conversations about this --
16 the technology can be set up for, like, a laptop computer and
17 also for cell phones. It's better on certain types of cell
18 phones than others. We would propose that it would be enabled
19 on a single cell phone and a single laptop, and that the
20 defendant, at least without a further motion to your Honor,
21 would be precluded from using any other electronic devices.

22 THE COURT: Would I be wrong in assuming that his
23 parents have computers and cell phones?

24 MR. ROOS: I don't know for certain, but I'm almost --
25 in the world we live in, you would assume.

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1 THE COURT: A couple of Stanford Law professors, it
2 would be pretty likely, yeah?

3 MR. ROOS: I would think so.

4 THE COURT: And you suppose there's a VPN in the
5 house?

6 MR. ROOS: So, in terms of the VPN, I think there's
7 certainly one --

8 THE COURT: Excuse me, I misspoke. I meant to say a
9 Wi-Fi network.

10 MR. ROOS: Yes, well, I know for certain that there is
11 some form of internet network just from the records the
12 government has.

13 THE COURT: So, putting all this monitoring on one
14 cell phone and one computer for the defendant leaves him in a
15 house with a whole bunch of unmonitored devices that are
16 perfectly capable of doing what you're trying to stop him from
17 doing.

18 MR. ROOS: That, I agree with. Frankly, I don't know
19 that there's a great solution for third parties' devices in the
20 same home as the defendant.

21 THE COURT: Well, you know, there is a solution, but
22 it's not one anybody's proposed yet.

23 MR. ROOS: I think beyond -- in terms of devices,
24 beyond the you're not allowed to touch any other devices,
25 there's not a device-tailored solution.

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1 THE COURT: But we are dealing with somebody who, on
2 the basis of your proffer anyway, has done things that suggest
3 to me that there may very well be probable cause to believe
4 that he either committed or attempted to commit a federal
5 felony while on release, namely, witness tampering or attempted
6 witness tampering. And I explained why that might be in what I
7 wrote a week or so ago.

8 Why am I being asked to turn him loose in this garden
9 of electronic devices, where he is in home detention, in light
10 of that background?

11 MR. ROOS: So, I don't disagree with your Honor about
12 how you're characterizing the facts. We've taken the same
13 position in our letter briefing. I think in terms of the
14 broader question, of the defendant's release, the government is
15 attuned to finding a solution that is narrowly tailored under
16 the Bail Reform Act, but guards against these risks going
17 forward.

18 I think like a more drastic alternative, while the
19 defendant would still be on release, would be to have no access
20 to any form of electronic device, and not to allow him to be
21 around them, but, of course, there are countervailing issues,
22 namely, access to his attorneys and to discovery. And I think,
23 in part, having him live with his parents is a check against
24 some other risks, which is risks that come from being
25 unmonitored and by yourself.

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1 THE COURT: All right.

2 Anything else you want to add?

3 MR. ROOS: No, your Honor. Well, let me just check
4 with my cocounsel one second.

5 (Pause)

6 MR. ROOS: Nothing else, your Honor.

7 THE COURT: Okay.

8 Mr. Cohen?

9 MR. COHEN: Thank you, your Honor.

10 Like Mr. Roos, I don't think I should repeat
11 everything in the letters. This has been, I know, extensively
12 briefed by your Honor.

13 What we're asking, your Honor, is for the Court to
14 adopt the conditions that we proposed in our letter of
15 yesterday. There are a couple of things here that I think need
16 to be focused on that were not really emphasized in counsel's
17 presentation.

18 First, this is a very draconian proposal. Under the
19 government's proposal – and I had to read it twice to
20 understand it myself, and I'm still not sure I fully understand
21 it, your Honor – our client would not be able to use the
22 internet at all. He would not be able to do Google research.
23 He would not be able to use something called Google Docs, which
24 is something that we work with clients all the time, where you
25 set up a shared document with your lawyer, and you can have a

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1 living document where you exchange ideas and attorney-client
2 communications, which we have used with our clients. He would
3 not be able to use Microsoft Word to type anything up. In a
4 case, when we finally get to it, that's going to involve a lot
5 of financial analysis and statistical analysis, he wouldn't be
6 able to use any of the computational programs that are
7 available on sites. He would not be able to participate in a
8 Zoom call with a witness if we went through the process we
9 talked about with your Honor -- counsel had contacted a witness
10 who was willing to speak with us, and the defendant, he would
11 not be able to be on that call.

12 And the exchange your Honor just brought out, counsel
13 brought into the fold, he wouldn't be able to access this
14 extensive database that has all the financial records --

15 THE COURT: Well, it may be possible to arrange for
16 him to have that access.

17 MR. COHEN: Your Honor, with respect, I'm not sure
18 that it is. I'm certainly willing to hear from counsel, but
19 we're now at the end of February, we have motions due before
20 your Honor in April --

21 THE COURT: But, look, Mr. Cohen, it isn't the
22 government who contacted the witness, it isn't the government
23 who instructed his people to use encrypted software for
24 communication, and it wasn't the government who, at least
25 according to Ms. Ellison's proffer, said that it's best not to

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1 have documents or anything you can look at because legal cases
2 are built out of them. Your client did all that.

3 MR. COHEN: Your Honor --

4 THE COURT: Excuse me.

5 And your client is at liberty on quite extraordinary
6 conditions, and I mean that in the sense of not draconian
7 conditions, but liberal conditions.

8 Moreover, I think the onus is on you to establish to
9 my satisfaction that whatever conditions I might contemplate,
10 in fact, will be effective in protecting the public from
11 witness tampering and whatever else is at risk by virtue of
12 giving him all this access.

13 MR. COHEN: I understand, your Honor. And that
14 actually takes me to my next point, but I should say, I
15 understand your Honor's prior ruling on a preliminary basis,
16 but for record purposes, we dispute that that's what he was
17 trying to do with the communication with Witness 1.

18 THE COURT: Well, I assume that you do dispute it.

19 MR. COHEN: And also, frankly, the proffer as to
20 Ms. Ellison, we have a very different view of what happened.
21 That's for trial, your Honor, but that's not what happened.

22 THE COURT: Well, look, maybe so, but were this a
23 revocation proceeding -- and at the moment, it isn't, but it
24 could get there conceivably -- all the evidence has to establish
25 is probable cause of the commission of a felony, and then the

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1 presumption shifts to detention.

2 MR. COHEN: Even though we're not in that proceeding,
3 let me try to take on that obligation to your Honor, if I
4 might.

5 I think the best way to do it is to go condition by
6 condition, and I apologize if I repeat a little bit of what we
7 talked about with your Honor last time.

8 THE COURT: You have my full attention.

9 MR. COHEN: Thank you.

10 The first thing that brought us before your Honor, was
11 at our initial appearance after the matter was transferred to
12 your Honor, was the allegation that there had been a transfer
13 from wallets of assets. That was on January 3rd in the
14 proceeding before your Honor.

15 When we learned about that, our client immediately
16 denied it, we denied it. We contacted the government and
17 offered to help. And at the first appearance before your
18 Honor, the government said, well, essentially, we don't believe
19 your client, fine, we're investigating. They have since only
20 offered the Court not proffer, not proffered evidence,
21 speculation that he was involved with that.

22 The bottom line is here we are at the end of February,
23 and there's no evidence that he had any involvement in that,
24 because he didn't, and the point for today's purposes under
25 3142(c)(3), that's not a basis for a further modification.

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1 Let's talk now about the no-contact rule, the no
2 contact condition. When we were last before your Honor, we
3 thought your Honor made an excellent suggestion, and we put it
4 in our draft to your Honor, which was: He's not allowed to
5 contact anyone, any witness or potential witness, without
6 counsel, and then we had worked out this exemption procedure,
7 and your Honor said, how do we know -- how do we have a record
8 of that, we need to have a record of that, and right after the
9 Court, we said, that's right. So we proposed adding that
10 condition with a requirement in writing.

11 Respectfully, we think that addresses the concern that
12 was raised before the Court last week and is itself not a
13 factor under 3142(c) for further modification.

14 Which brings us to the apps and the VPN. The reason
15 we put the declaration in before your Honor -- believe me, I am
16 probably the least technical person in this courtroom, one of
17 them anyway -- is just to show that this wasn't an effort -- in
18 watching the Super Bowl by using a VPN, it wasn't an effort to
19 get around the Court or get around the government. It's
20 different technology.

21 THE COURT: Look, I know the difference between a VPN
22 and -- right? But let's talk about that for a minute.

23 MR. COHEN: Sure.

24 THE COURT: I read your affidavit or declaration from
25 Dr. Sun -- I forget his title, but whatever -- and he tells me,

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1 and I certainly have no dispute, VPNs are used for different
2 purposes and all of that. What he does not say is VPNs do not
3 involve the use of encryption. He didn't say it because, as I
4 understand it, they do. And the condition was no encryption.

5 Now, I'm not quoting it exactly, I understand that,
6 but if there is one person in this courtroom who knew, I'm
7 pretty confident, without having to look up the difference
8 between a VPN and these encrypted messaging services, that the
9 VPN involved encryption, I'm betting it's your client.

10 MR. COHEN: With respect, people who grew up in the
11 technology world, like my client, actually if you ask them –
12 and we spoke to a number of people before we spoke to Dr. Sun,
13 but with the press of time, the reaction was they're just very
14 different things.

15 THE COURT: Well, I understand that.

16 MR. COHEN: I don't think by doing that, anyone with
17 that background would think, oh, I'm in contrast or conflict
18 with the limitation on the use of the Signal app. That's all
19 we were trying to say to your Honor.

20 The point is that, as well, can be addressed by a
21 condition, and what we tried to do in our submission is narrow
22 even further what could be used. And, frankly, one issue I had
23 with the government's presentation is, it starts from the
24 presumption, let's put in the most restrictive set of
25 conditions we can think of and then give a few carveouts. And

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1 it's actually the opposite of the standard under the Bail
2 Reform Act for bail conditions in the first place, and it
3 doesn't address the standard for modification. If that's the
4 only thing they've offered for modification, and it doesn't
5 carry their burden of even showing improper activity, then this
6 extensive set of new conditions, which at least as of today,
7 would prevent our client from even reviewing the database,
8 there's not a predicate for it, your Honor.

9 The other thing I meant to mention is they're also
10 asking for, basically, a permanent pen register. I'm not sure
11 we would object to that, but just stop and think about that,
12 without ever having to go to a judicial officer, without ever
13 having to make a showing under the pen register statute or
14 renewing. I'm not sure we would object to that, but I'm just
15 trying to illustrate the scope.

16 So, your Honor, we think, and we leave it to the
17 Court – obviously, we tried to work things out, but the Court
18 is going to have to rule – we think there's something that can
19 be fashioned here. And, with respect, my client understands
20 what's at stake here. He is literally on trial for his life.
21 We need him to work on this defense. We cannot go through all
22 of these extensive financial records without him being able to
23 participate. We cannot go through all the records of the
24 company without participating. We can't speak to defense
25 witnesses who are willing to speak to us after we go through

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1 the process that the government has laid out without him being
2 able to participate. We can't work with him if he can't use
3 something like Google Docs.

4 So, we're not saying further conditions shouldn't be
5 imposed, we agree with your Honor, and that's what we tried to
6 do in our letter.

7 So I think that's really all I had in the
8 presentation, but if I might consult with my cocounsel?

9 (Pause)

10 MR. COHEN: I'm corrected by my technology people.

11 THE COURT: You've been demoted, Mr. Everdell.

12 MR. COHEN: In fact, Mr. Everdell, why don't you just
13 tell the Court this instead of me trying to.

14 MR. EVERDELL: Your Honor, I just want to make one
15 correction or clarification. The condition that existed was a
16 prohibition against using any encrypted or ephemeral call or
17 messaging application.

18 THE COURT: I understand that, and that's why I
19 qualified what I said to Mr. Cohen. I'm well aware of that.

20 MR. EVERDELL: Thank you.

21 MR. ROOS: And I think your Honor had a great line
22 last time about Mary, Queen of Scots, which I looked up
23 afterwards, but the point I think your Honor cut through it is
24 any form of communication, whether it's a cipher from 1700s, or
25 I think there's a case, *U.S. v. Peterson*, where they talk about

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1 telephones, any form of communication could be used improperly.
2 And what the government keeps doing in its papers is saying,
3 well, here's something he could have done, yes, he used it to
4 watch a football game, but it could have been done improperly.
5 On that standard, there's no limiting principle, your Honor.

6 THE COURT: You know, you made me forget about the
7 football game. What was he doing watching football games on a
8 VPN, if that's really what he was doing, that anybody could
9 turn on their television set and watch for nothing?

10 MR. COHEN: I wish I had sent him a television from
11 Best Buy, your Honor.

12 THE COURT: Well --

13 MR. COHEN: There isn't a television in the house.

14 THE COURT: How about this possibility: You say --
15 and I'm not questioning your veracity at all; indeed, on this
16 point, I'm assuming he used it this way.

17 MR. COHEN: Understood.

18 THE COURT: So, on that assumption, the theory is that
19 he used it because he had the subscription from the provider to
20 an international license, which allowed him to watch the
21 football game provided he was outside the United States; yes?

22 MR. COHEN: Yes.

23 THE COURT: Okay.

24 So, what he was doing was sitting in California, in
25 the United States, using the VPN to create the impression that

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1 he was going to use this international subscription from
2 somewhere outside the United States and getting the service
3 from the provider of the programming by using the VPN to
4 deceive as to location.

5 MR. COHEN: Well, what a VPN does – and that's why we
6 put the declaration in to your Honor – we're open about what it
7 does and why lots of companies use it.

8 THE COURT: Sure, I understand.

9 MR. COHEN: And that's why we proposed to your Honor
10 that he not be allowed to use a VPN except to use the database
11 unless, as your Honor suggested, there's an alternative way.

12 I'm just worried because we got a communication from
13 company counsel this week when they saw the correspondence
14 between us and the government, they said, by the way, you know,
15 if you want to look at this database, your client needs to use
16 a VPN. So, if there's an alternative that can be fashioned
17 along the lines your Honor suggested for looking at the
18 database, we would be fine with that, but, as of today, I don't
19 know that there is.

20 THE COURT: Well, one of my problems here is that you
21 have (a) your client and (b) access to high-tech people who can
22 advise you about this; the government may also, I don't know; I
23 don't. And viewing this from the perspective that it's your
24 burden to satisfy me here, what about the defense bearing the
25 cost of a consultant to the Court to advise me about this – not

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1 to be a witness or anything like that, and you don't have to
2 give me an answer now -- someone who could say, well, here's the
3 way you deal with that FTX database, or here is what the real
4 risk of a VPN or some other gizmo is, a security expert really,
5 in effect.

6 MR. COHEN: Who would only work for the Court?

7 THE COURT: Who would only work for me confidentially,
8 effectively like another law clerk.

9 MR. COHEN: We will certainly come back to your Honor
10 right away on that. We just need to, obviously, consult.

11 THE COURT: Well, as I say, it's your burden, it's in
12 your interests for me to be content with this, if I can be.

13 Let me just consult my notes and see if there -- oh,
14 yes, of course.

15 What's your response to my concern about his presence
16 in a household with all sorts of unmonitored devices? I assume
17 that, of course. I know what's going on in my apartment, so I
18 suspect -- right.

19 MR. COHEN: It's sort of a little bit ironic, your
20 Honor, because one of the reasons we worked out the package we
21 did with the government at the time we were presented before
22 the magistrate judge was that his parents would be with him.
23 And that was deemed to be another useful piece for purposes of
24 the bail package.

25 So, if he were living alone, then we might be before

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1 you, your Honor, on other concerns. So, I think, unless we can
2 explore him living alone, if that's what the Court would like
3 us to do, he needs to live with his parents, but, certainly,
4 there can be -- how would I put it? I think we understand from
5 your comments today, your Honor, that there is no margin for
6 error, that if there's any, any violation of whatever order the
7 Court fashioned, we're going to be in a very different
8 proceeding. I think your Honor has been very clear about that.

9 And I think we would just instruct the defendant and
10 discuss it with his parents and make sure that it didn't
11 happen.

12 THE COURT: So, what do you propose, we take some more
13 time?

14 MR. COHEN: We can come back to the Court on the issue
15 of a consultant for the Court, we can come back to the Court on
16 anything the Court would like us to. If the Court would just
17 give us some guidance about what about our proposal and what
18 about the government's --

19 THE COURT: Well, I've already given you a lot of my
20 concerns. Obviously, high on the list is all these other
21 devices that would not be monitored, not accounted for, we
22 wouldn't know what's there, what's not there, or how they're
23 being used.

24 MR. COHEN: Okay.

25 THE COURT: The device monitoring software or whatever

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1 it is that somebody proposed putting on the one or two devices
2 the defendant would have access to, I don't know what that is,
3 and I don't know how it works, and I don't know how effective
4 it is. Nobody has addressed whether monitoring of the Wi-Fi
5 network, if there is one in the home, is something that ought
6 to be considered and whether it could be effective.

7 MR. COHEN: If your Honor would like, we can come back
8 to your Honor with a letter that tries to address all these
9 things. Would that be useful?

10 THE COURT: Yes, I think it would, and I think the
11 government ought to respond, too, because I gather, from what
12 Mr. Roos said, in responding to one of my first questions to
13 him, that this isn't actually the proposal, this is — I'm
14 referring to the government's letter — the conceptual framework
15 of an order.

16 MR. COHEN: That's right.

17 THE COURT: And I got that right away when I asked the
18 cell phone question, and Mr. Roos said, well, yes, we would
19 define computers and cell phones and so on in such a way that
20 it would pick that up.

21 MR. COHEN: Should we give your Honor a proposed order
22 with an explanation for the terms?

23 THE COURT: Well, if you can't come to something you
24 both agree on, in which case you should address why the
25 concerns I've expressed are satisfied, or if you can't, then I

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1 suppose I'm asking for two, and if you can get back to me by –
2 and I'll give you two different dates here – about a consultant
3 to the Court early in the week – I don't know how much time you
4 need to do that, but I'm guessing not very long – let's say
5 Monday -- no, Monday is a holiday -- Tuesday, that would be
6 ideal, and then by the end of next week on the other, or if you
7 need more time, I'll simply extend the order, and I will give
8 you what you need, within reason.

9 MR. COHEN: That would be fine, your Honor.

10 THE COURT: Okay.

11 MR. COHEN: That would be fine.

12 I do have an unrelated scheduling question.

13 THE COURT: Okay. I might even have an unrelated
14 answer.

15 MR. COHEN: I just want to know – and, of course, if
16 you need us here, we'll be here – if you expect to be needing
17 us here next week, because I am supposed to be at the American
18 College spring meeting, I'm the New York chair. I'm supposed
19 to be there from Wednesday on, but, of course, I will be here
20 if you need me here.

21 THE COURT: Well, I suppose as the New York chair, you
22 would tell me I'm supposed to be there, but I won't be, and,
23 no --

24 MR. COHEN: That's above my level, your Honor.

25 THE COURT: That's okay. When Judge Rivkin was the

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1 chair, he would tell me.

2 Anyhow, no, it looks like I'm going to have to extend
3 the order into the following week.

4 MR. COHEN: But if you need me here, I'll be here.

5 THE COURT: Look, I'm not going to do that. You have
6 a commitment for good reason, and I will honor it, as long as
7 there's no problem on extending the existing restrictions.

8 MR. COHEN: Oh, no, no, no, of course. We're assuming
9 you'll extend the existing order until there's a new order.

10 THE COURT: Yes.

11 So, I've charted out some things for both sides to
12 work on. I want this to be tight – not tight just in
13 characterization, but tight in fact.

14 MR. COHEN: Got it.

15 THE COURT: Okay.

16 I thank you.

17 MR. COHEN: Yes, your Honor.

18 THE COURT: It's always a pleasure dealing with
19 professionals on both sides.

20 MR. COHEN: Thank you.

21 THE COURT: Thanks.

22 * * *